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April 1, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Closed Captioning and Video Description of Video Programming
MM Docket No. 95-176

Dear Mr. Caton:

Enclosed are an original and nine copies of the reply comments of Encore Media Corporation in the above-referenced proceeding. Please distribute a copy to each of the Commissioners.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

RLH:ssm
Enclosures

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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
) MM Docket No. 95-176
Closed Captioning and Video)
Description of Video Programming)

REPLY COMMENTS OF ENCORE MEDIA CORPORATION

Encore Media Corporation ("Encore") submits these reply comments in response to the Notice of Inquiry in this proceeding which the Commission has announced also will be used to satisfy the requirements of Section 305 of the Telecommunications Act of 1996. Recognizing the importance of serving consumers with hearing and visual disabilities, Encore seeks to provide the information and views requested by the Commission.

A. Encore's Premium Programming Services And Closed Captioning

Encore provides the following channels of commercial-free premium programming services to multichannel video programming distributors, including cable, DBS, SMATV and MMDS operators:

"ENCORE," consisting primarily of movies that first were released in the 1960's, 1970's and 1980's and of movies that, in most cases, will appear four or more years after their original release;

ENCORE's "Thematic Multiplex," comprised of Love Stories-encore 2, Westerns-encore 3, Mystery-encore 4, Action-encore 5, True Stories & Drama-encore 6, and WAM! America's Youth Network-encore 7; and

ENCORE's "First Run Multiplex," "STARZ!-encore 8," featuring, in addition to ENCORE titles, exclusive first-run, uncut releases from studios such as Universal Pictures, Touchstone Pictures, Hollywood Pictures, Carolco Pictures, Inc., New Line Cinema, Miramax Films, Fine Line Features and other studios and/or distributors.

Encore also provides several additional formats and/or multiplexes of these premium services. As of year-end 1995, ENCORE and STARZ!-encore 8 had approximately 7.6 and 3.2 million subscribers respectively.

Encore transmits the closed captioning provided by producers and/or distributors with the programming it exhibits. To the extent that Encore utilizes closed captioned programming excerpts in promotions and other interstitials, it includes the closed captioning existing in the excerpts. Virtually all of the recent releases exhibited on ENCORE and STARZ!-encore 8 are closed captioned. Consequently, the proportion of closed captioned programming exhibited on ENCORE and STARZ!-encore 8 during prime time is substantially higher. As its programming services continue to exhibit newer releases, Encore expects the proportion of programming with closed captioning to continue to increase.

B. Closed Captioning Efficiencies

As recognized in the House Report, "[i]t is clearly more efficient and economical to caption programming at the

time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."¹ H.R. Rep. No. 204, 104th Cong., 1st Sess. 114 (1995). Encore endorses this approach as the most efficient vehicle for continuing the widespread practice of closed captioning -- Encore and other distributors of programming will continue to share the costs of such closed captioning through the payment of rights fees. See Comments of Bell Atlantic at 7 ("if captioning or description is added when programming is created, the expense is incurred once and becomes part of the programming wherever it is subsequently distributed"); Comments of Capital Cities/ABC, Inc. at 11-12 ("[p]lainly a program producer -- who will presumably have the program's script available in a computer database -- will find adding captioning less burdensome and expensive than parties down the distribution chain"); Comments of CBS, Inc. at 21-22 ("program syndicators may be expected to attempt to spread the cost of captioning in licensing negotiations").

¹ The Motion Picture Association of America, Inc. ("MPAA") succinctly explained the technological efficiencies of this approach as follows:

Following first run release, a "submaster" of each motion picture is created; the submaster is closed captioned by the National Captioning Institute or another captioning service. All prints of the motion picture distributed for broadcast, cable television or home video exhibition are manufactured from the initial captioned submaster prepared for home video release, or from a subsequent submaster edited for broadcast television, and are therefore captioned themselves.

MPAA Comments at 4 n.7.

MPAA confirms the virtually universal and ongoing efforts by movie producers and other programmers to close caption all new titles:

Today, nearly all widely distributed motion pictures produced and distributed by MPAA member companies are closed captioned for distribution over broadcast television, home video and cable television following their theatrical release. In addition, thousands of titles initially released prior to this period have also been captioned. Currently, more than 6,000 closed captioned titles have been distributed.

MPAA Comments at 3-4 (note omitted). As Encore expands its production and/or joint ventures in the production of feature-length premium programming, it also expects to provide closed captioning for such programming.

C. Exemptions from Mandatory Closed Captioning

In its Notice of Inquiry at ¶¶28-31 and pursuant to 47 U.S.C. §613(d), the Commission has requested comment regarding the "programs, classes of programs, or services"² which should be exempted from closed captioning requirements. Although Encore recognizes that the Commission will propose implementing regulations under Section 613(b), Encore offers the following preliminary observations regarding classes of

² For example, several commenters have suggested that premium services should be exempted from closed captioning requirements because they are separately purchased discretionary channels which are particularly susceptible to changes in consumer demand and responsive to marketplace incentives. See Comments of Home Box Office ("HBO") at 15-16; Comments of the Satellite Broadcasting and Communications Association at 9-10. Consequently, the "natural competitiveness" among such services is sufficient to compel enhancements such as closed captioning. HBO Comments at 15-16.

programming that should be closed captioned as the marketplace dictates and exempted from any mandatory requirements.

1. Pre-Existing Programming

As numerous commenters have documented, there is a large volume of previously produced programming which has not been closed captioned and for which the expense of closed captioning would be prohibitive. See MPAA Comments at 11-12 ("any such retroactive requirements would be impractical"); Comments of the National Cable Television Association, Inc. at 11-12 ("it would be an impossible undertaking to caption all of these libraries"). Indeed, Congress expressly recognized this burden in 47 U.S.C. §613(b) and distinguished between newly-produced programming, which is to be "fully accessible" to the hearing impaired, and pre-existing programming, for which programming providers or owners are to "maximize" accessibility.

An exemption from closed captioning requirements for pre-existing programming on services such as ENCORE, its Thematic Multiplex, and its First Run Multiplex (STARZ!-encore 8) is particularly appropriate and consistent with the criteria for exemptions identified by Congress. For example, in contrast to the penetration of television households achieved by broadcast television networks and well-established basic cable programming services, no Encore programming service is received by even 10 percent of the nation's television households. Further, because Encore's programming services do not

carry commercials or promotional announcements of any kind, Encore cannot obtain corporate sponsorship and financial support for closed captioning -- in contrast to broadcasters and advertising-supported cable programming services.

Consequently, requiring Encore to close caption programming previously produced by third parties would be prohibitively expensive and directly contrary to the marketplace choice which Encore seeks to provide consumers -- a high-quality, low-cost premium programming alternative suitable for family viewing. This relationship between the "cost of captioning" and the "relative size of the market served" by the Encore programming services is one of the critical factors to be considered in establishing exemptions. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996).

2. Interstitial Programming

Encore also supports those commenters who have recommended that interstitial material, including promotional spots, be exempted as a "class of programming" from any closed captioning requirements. See HBO Comments at 14-15; Comments of National Broadcasting Company, Inc. ("NBC") at 4. Such interstitial material consists of promotional and other limited programming that is inserted between the feature presentations on ENCORE, its Thematic Multiplex channels and STARZ!-encore 8. Generally, interstitials have lower viewership and, to the extent that they contain promotional information, typically include on-screen graphics providing essen-

tially the same information available through the accompanying audio. HBO Comments at 15; NBC Comments at 4. In contrast to feature presentations, interstitials have very short life spans so that captioning costs may not be spread across multiple showings. See CBS Comments at 35 n.50. Further, because of the number and nature of such interstitials, closed captioning would be difficult and prohibitively expensive with little, if any, added value. See NBC Comments at 4 ("[c]aptioning so many spots in the available time would be a logistical nightmare").

D. Video Description

As observed by numerous commenters, video description is a relatively new development, and few movie titles have been video described. See, e.g., MPAA Comments at 5-6. Consequently, Encore has had little experience with the feasibility of video description and the associated technology. Encore is concerned that present video description technology utilizes the Second Audio Program ("SAP") which currently is used for foreign-language audios on ENCORE and STARZ!-encore 8. Further, commenters have suggested that video description may raise difficult issues under applicable copyright law as a "derivative work." Id. at 10-11. Consequently, Encore believes that video description requires further information and analysis, and consideration of such substantive issues may be premature.

Conclusion

Encore continues to participate in making video programming more accessible to American consumers. Encore believes that imposing reasonable requirements upon programming producers and establishing selected exemptions, including limited exemptions for pre-existing programming and interstitial programming, strike the appropriate balance sought by the Commission "between providing access to Americans with disabilities through closed captioning and video description and the costs and burdens imposed by mandatory requirements." Notice of Inquiry at ¶29.

April 1, 1996

Respectfully submitted,

ENCORE MEDIA CORPORATION

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